IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 14, 2005 Session

SHERRI MORGAN LADUE v. BRIAN CHARLES LADUE

Appeal from the Circuit Court for Knox County
No. 97833 Bill Swann, Judge

Filed August 25, 2005

No. E2004-02481-COA-R3-CV

Sherri Morgan LaDue ("Wife") alleged in the trial court that her husband, Brian Charles LaDue ("Husband"), had viciously and repeatedly attacked and beaten her in violation of an order of protection. The trial court found that Husband had committed 19 violations of the order, and that each violation constituted an act of criminal contempt. The court determined that the appropriate punishment for each violation was the maximum period of incarceration – ten days in jail. The court imposed 19 consecutive sentences, *i.e.*, 190 days in jail, effective June 9, 2005. In its final judgment, the trial court directed that "a judge who may sentence [Husband] in the future should not have the discretion to give 190 days credit for time served for any of the same 190 days for which [Husband] is now being sentenced for criminal contempt." Husband appeals. We modify the judgment of the trial court. As modified, the judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Vacated in Part; Reversed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

John A. Hoag, Knoxville, Tennessee, for the appellant, Sherri Morgan LaDue.

Thomas F. diLustro, Knoxville, Tennessee, for the appellee, Brian Charles LaDue.

OPINION

I.

On July 24, 2004, Husband was arrested in Knox County and charged with aggravated assault stemming from the beating he allegedly administered to Wife. His bond was set at $5,000. On July 26, 2004, the trial court entered an order styled "Order Granting Bail for Domestic Abuse Cases," in which Husband's bond was set at $125,000 with respect to the protective order proceeding.

On July 29, 2004, Wife filed a pleading in the trial court styled "Motion for an Order to Show Cause and Writ of Attachment" against Husband, her then-spouse.[1] The motion sought to enforce a "Domestic Violence Protective Order" ("the West Virginia DVPO") entered on June 16, 2004, by the Mingo County, West Virginia Family Court. The motion alleged that Husband had committed "multiple violations" of the West Virginia DVPO. In her motion, Wife asked the trial court to find Husband in contempt for incidents occurring in the time frame of July 22, 2004, up to and including the early-morning hours of July 24, 2004.

At Husband's preliminary hearing, the court upgraded the charge against him to attempted second degree murder. The court increased his bond from $5,000 to $100,000 and bound him over to the Knox County grand jury. Husband was subsequently indicted by the grand jury for attempted second degree murder and aggravated assault. He was awaiting trial on those charges in the Knox County Criminal Court when the trial court in the instant case conducted a hearing on September 16, 2004, on Wife's charge of criminal contempt.

There is a transcript of the September 16, 2004, hearing in the record. Suffice it to say that the transcript and photographs of Wife in the record, and the proof as found by the trial court, clearly show that Wife suffered a terrible beating at the hands of Husband. Since Husband does not challenge the trial court's factual findings or its determination that Husband's conduct warranted incarceration, there is no need to recite the horrendous facts as shown in the record.

By an order entered September 16, 2004, the trial court held that Husband had committed "multiple acts of criminal contempt." The court sentenced Husband to "190 days, for 19 violations found beyond a reasonable doubt."

In its order, the trial court decreed as follows:

> This time (190 days) shall be served consecutively to (and only begin to be served, at the conclusion of) any time imposed upon Brian by Knox County Criminal Court. If none is imposed, it shall run from 7/24/04. He shall <u>not</u> be released from the hold of this Court until this Court notes the conclusion of the Knox Criminal case, and enters an appropriate order of release signed by Judge Swann, or his interchange judge.

(Underlining in original).

On June 9, 2005, the trial court held another hearing. While there is no transcript of that hearing, there is a transcript of the court's proceedings on the next day – June 10, 2005 – at which

[1] When Wife's pleading was filed in the trial court, the parties were still married. Her motion makes reference to a discussion the parties had on July 23, 2004, regarding their "pending divorce." While the parties are now divorced, we will refer to them, solely for ease of reference, as "Wife" and "Husband."

time the trial court rendered its judgment with respect to the matters involved in the hearing on June 9, 2005. The transcript of the June 10, 2005, hearing clearly delineates the issue from the hearing on the 9th as shown by the following comments of the trial court in its memorandum opinion delivered from the bench:

> Well, the proof was received yesterday, the 9th of June, and the Court finds today from the testimony of David Lane, owner of City Bonding Company, that Mr. Ladue, through his family, friends, and employer, is capable of and indeed will post his $100,000 bond for the criminal court immediately. This would then leave him only with a hold from this court. This hold proceeds from the ruling that this judge made on September 16, 2004, that the 190-day sentence of criminal contempt imposed upon Brian Ladue was to be served consecutive to any sentence imposed by the criminal court.

By order entered June 30, 2005, the trial court memorialized its ruling on June 10, 2005:

> Mr. Ladue is capable of and indeed will post the bond imposed by the Knox County Criminal Court.
>
> Had Mr. Ladue presented his bondsman earlier, he could have availed himself of this opportunity earlier. He did not.
>
> The 190-day sentence imposed by this Court shall be served and shall run from yesterday, June 9, 2005. He is released from any hold of this Court on completion of the 190th day.
>
> The Memorandum Opinion, *nunc pro tunc* to June 10, 2005, is hereby incorporated by reference in this Order, as though set out verbatim.

(Paragraph numbering omitted).

Finally, by "Addendum to Memorandum Opinion," the trial court clarified its memorandum opinion of June 10, 2005. The court entered its addendum on July 1, 2005, *nunc pro tunc* June 10, 2005. As pertinent to this appeal, the court decreed as follows:

> It is the opinion of this court that a judge who may sentence Mr. Ladue in the future should not have the discretion to give 190 days credit for time served for any of the same 190 days for which he is now being sentenced for criminal contempt. If this scenario occurred, the judgment of this court would be rendered a nullity. Affording a future judge the discretion to render this court's sentence a nullity

> would be no more just than it would be for this court to require Mr. Ladue to remain incarcerated indefinitely.
>
> This matter is now concluded and no issues remain. It is a final order.

II.

Husband raises two issues on this appeal:

> 1. Whether the notice given to him in this case satisfies the requirements of Tenn. R. Crim. P. 42(b).
>
> 2. Whether the trial court's final judgment is a legally-valid judgment.

III.

Husband contends that the notice he received regarding the contempt proceedings did not comport with the requirements of Tenn. R. Crim. P. 42(b). Rule 42(b) provides, in relevant part, as follows:

> A criminal contempt except as provided in subdivision (a)[2] of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest.

In the instant case, Wife's motion for an order to show cause sought an "[o]rder directing [Husband] to Show Cause why [he] should not be held in contempt of Court for multiple violations of the Order of Protection." Wife then proceeded to enumerate, with a great deal of specificity, the separate alleged violations of the West Virginia DVPO that gave rise to her charge of contempt. Husband argues that this petition fails to satisfy the prescriptions of Rule 42(b) because Wife did not specifically ask the court to find Husband in *criminal* contempt.[3] We disagree.

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[2] This part of the rule has no application to the facts of this case.

[3] In further support of his argument, Husband points to language in the West Virginia DVPO which purportedly indicates that a violation of the order constitutes a civil contempt of court. However, since the referenced document is not in the record, but rather included as a part of the appendix to Husband's brief, it is not properly before us.

In interpreting this rule, we have previously held that

> [t]he Tenn. R. Crim. P. 42(b) notice must specifically charge a party with criminal contempt and must succinctly state the facts giving rise to the charge. Because the same conduct can constitute both civil and criminal contempt, the Tenn. R. Crim. P. 42(b) notice eliminates any possible confusion concerning the nature of the proceeding.

Jones v. Jones, No. 01A01-9607-CV-00346, 1997 WL 80029, at *3 (Tenn. Ct. App. M.S., filed February 26, 1997). Accordingly, where the failure to designate the type of contempt results in "possible confusion concerning the nature of the proceeding," we have vacated sanctions for criminal contempt due to this shortcoming. *See, e.g.*, ***Storey v. Storey***, 835 S.W.2d 593, 599, 600 (Tenn. Ct. App. 1992) (defendant did not receive proper notice where none of the contempt petitions charging the defendant with failing to pay support and dissipating the marital assets designated the contempt as criminal, and the defendant did not become aware of the nature of the contempt until after he was sentenced by the court's memorandum opinion); ***Bailey v. Crum***, No. E2004-00953-COA-R3-CV, 2005 WL 1488585, at *5 (Tenn. Ct. App. E.S., filed June 23, 2005) (where neither the notice nor the petition for contempt indicated if the alleged contempt was criminal or civil, and the relevant documents failed to notify the defendant as to the alleged facts upon which the contempt charge was based, the defendant did not receive proper notice); ***Jones***, 1997 WL 80029, at *4 (where the contempt allegation asserted that the defendant violated the court's visitation orders, but did not specify the nature of the contempt charged, the record raised serious doubts as to whether the defendant understood that he could possibly be exposed to criminal sanctions).

The instant case can be distinguished from these cases in that it is clear that Husband was not confused as to the nature of the contempt charge against him. In Husband's motion to continue, he averred that "[t]he Motion filed by [Wife] to command [Husband] to Show Cause involves issues that are *both criminal and civil in nature*." (Emphasis added). Husband filed several motions, including one for funds for a court reporter and one for funds to cover the cost of a transcript. In granting these motions, the court stated in support thereof that "[Husband] . . . is at risk of incarceration based upon the allegations contained within [Wife's] Motion to Show Cause and for Writ of Attachment," and that

> [f]rom argument of counsel and the record as a whole, it appears to this Court that due to the seriousness and complexity of the allegations contained within the Motion to Show Cause and for Writ of Attachment filed by [Wife] alleging serious bodily harm and containing a great number of alleged violations of the protective order . . . the need to protect [Husband's] constitutional rights under the United States and Tennessee constitutions, and the seriousness of the potential incarceration of [Husband], a record of the proceedings should be made.

Based on the foregoing, we cannot say that Husband did not have adequate notice of the criminal contempt charge against him. He effectively acknowledged that he understood he was facing criminal contempt charges in his motion to continue. Furthermore, the extensive and detailed allegations set forth in Wife's show cause motion put Husband on notice of the essential facts so that he could adequately prepare a defense. This is not a case, as in ***Storey***, where the failure to furnish notice deprived the party charged with the opportunity to "purge himself." ***Storey***, 835 S.W.2d at 600.

As the Court of Criminal Appeals noted soon after the adoption of Tenn. R. Crim. P. 42, "it is not necessary that the notice expressly describe the proceeding as criminal contempt. It is enough if the defendant is aware a prosecution for criminal contempt is contemplated."[4] ***Simerly v. Norris***, No. 1071, 1987 WL 8315, at *8 (Tenn. Crim. App. E.S., filed March 26, 1987). It is clear that Husband knew he was facing serious charges of criminal contempt.

IV.

In his second issue, Husband, in so many words, challenges the propriety of the trial court's judgment. The thrust of his argument is set forth in the following paragraph of his brief:

> Given that the Court below stated it [sic] purpose to incarcerate the Appellant as much as possible and that incarceration has already progressed beyond the statutory maximum, the Court below has overstepped its bounds. Here, the Appellant's sentence is plainly excessive and should be modified by this Court to grant him credit for every day he has served, thereby releasing him from the hold of the Fourth Circuit Court. The sentence, as imposed, exceeds the criminal liability for contempt as specified in the show cause motion.

The theory or theories upon which Husband bases his contention of invalidity are not entirely clear. What is clear is that Husband's arguments are directed at the wrong judgment. The brief contains a statement of the case and a statement of the facts, both of which end with the trial court's judgment of September 16, 2004. In that judgment, the court ordered that Husband's sentence of 190 days would "be served consecutively to (and only begin to be served, at the conclusion of) any time imposed upon [Husband] by Knox County Criminal Court." That is *not* the final judgment. The final judgment of the trial court is reflected in the court's order of June 30, 2005, as modified by a filing by the court on July 1, 2005. As modified, the trial court's ultimate sentence includes the following elements: (1) incarceration for 190 days; (2) an effective date of June 9, 2005; and (3) a directive to a court that may sentence Husband in the future that such court "should not have the discretion to give 190 days credit for time served for any of the same 190 days for which [Husband]

[4] In so stating, the Court of Criminal Appeals relied on federal law, since Tenn. R. Crim. P. 42 tracks the federal rule. ***Simerly***, 1987 WL 8315, at * 8. *See also* Tenn. R. Crim. P. 42, Advisory Commission Comments.

is . . . being sentenced for criminal contempt." *This* is the judgment now before us and the one whose validity we will examine.

We do not interpret Husband's brief as challenging (1) the trial court's determination that Husband was guilty of 19 violations of the West Virginia DVPO; (2) the court's decision to assess the maximum penalty of 10 days for each violation; or (3) the court's judgment that these 19 sentences should be served consecutively rather than concurrently. However, even if we are wrong in our understanding of Husband's contentions on appeal, we find no error in these aspects of the court's final judgment. We do believe, however, that the court erred in selecting a start date of June 9, 2005, and in attempting to strip a future sentencing court of its authority to run a future sentence concurrently with all or any portion of the 190-day sentence imposed in the case now before us.

Tenn. Code Ann. § 40-23-101(c) (2003) provides as follows:

> The trial court shall, at the time the sentence is imposed and the defendant is committed to jail, the workhouse or the state penitentiary for imprisonment, render the judgment of the court so as to allow the defendant credit on the sentence for any period of time for which the defendant was committed and held in the city jail or juvenile court detention prior to waiver of juvenile court jurisdiction, or county jail or workhouse, pending arraignment and trial. The defendant shall also receive credit on the sentence for the time served in the jail, workhouse or penitentiary subsequent to any conviction arising out of the original offense for which the defendant was tried.

Thus, it is clear that an incarcerated individual is entitled to credit for time spent in jail because of the individual's failure to post bond. *See* ***Stubbs v. State***, 393 S.W.2d 150, 154 (Tenn. 1965). *See also* ***United States v. Jones***, 393 F.2d 728, 729 (6th Cir. 1968).

In the instant case, Husband was initially incarcerated on a felony charge of aggravated assault. In addition, he was held in lieu of the $125,000 bond *set by the trial court in connection with Wife's charge of contempt.* He was initially taken into custody on June 24, 2004. The designation of this date as the start date of his sentence for criminal contempt ensures that Husband will receive "credit on the sentence for any period of time for which [he] was committed and held in . . . jail," pursuant to Tenn. Code Ann. § 40-23-101(c).

The trial court selected a start date of June 9, 2005. The court selected this date because that was the date that Husband first evinced his ability to make the bond set by the general sessions court judge when the judge bound Husband over to the grand jury. However, the date of June 9, 2005, fails to take into account that Husband was incarcerated on June 24, 2004, and held in lieu of the bond set by the trial court. Accordingly, we vacate the trial court's "start date" of June 9, 2005, and provide instead that Husband's 190 days sentence begins to run on June 24, 2004.

As previously noted, the trial court recited that a future sentencing court "should not have the discretion to give 190 days credit for time served for any of the same 190 days for which [Husband] is . . . being sentenced for criminal contempt." We hold that this attempt to dictate to a future sentencing court was improper.

Tenn. Code Ann. § 40-20-111(a) (2003) provides as follows:

> When any person has been convicted of two (2) or more offenses, judgment shall be rendered on each conviction after the first, providing that the terms of imprisonment to which such person is sentenced shall run concurrently or cumulatively in the discretion of the trial judge. The exercise of the discretion of the trial judge shall be reviewable by the supreme court on appeal.

"Generally, the last sentencing court should have the responsibility to determine whether or not a sentence should be served consecutively." ***State v. Arnold***, 824 S.W.2d 176, 178 (Tenn. Crim. App. 1991).

The trial court stated that it did not believe the ***Arnold*** case applied to the facts of this case. While the court did not state precisely why it believed the holding in ***Arnold*** was not implicated by the facts of the case at bar, it may well have been because the court was dealing with criminal *contempt* and not a crime in the traditional sense. In our opinion, this is a distinction without a difference. A day in jail is a day behind bars whether one is incarcerated awaiting trial on a criminal charge or is in custody because he or she cannot make a bond set by a judge before whom a contempt citation is pending. A day in jail is a day without freedom whether that day is being served because of a sentence following conviction of a crime or because of a punishment imposed for an act of criminal contempt. There simply is no difference. Tenn. Code Ann. §§ 40-20-111(a) and 40-23-101(c) address sentences and credit for time spent in jail. We see no reason to hold that they apply to crimes in the traditional sense but not to criminal contempt.

V.

The judgment of the trial court imposing a sentence of 190 days in jail for criminal contempt is affirmed. The trial court's selection of June 9, 2005, as a start date for the sentence is vacated. Husband's sentence begins on June 24, 2004. The trial court's admonition to a future sentencing court is reversed and held for naught. Since Husband has now served his sentence, he is released from the hold of the trial court. Exercising our discretion, we tax the costs on appeal to Brian Charles LaDue.

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CHARLES D. SUSANO, JR., JUDGE